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No. 09-14

In the Supreme Court of the United States

CATHERINE SHANNON, DIRECTOR OF THE ILLINOIS DEPARTMENT OF LABOR, *ET AL.*, PETITIONERS,

v.

520 SOUTH MICHIGAN AVENUE ASSOCIATES, LTD., RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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INTRODUCTION

This case turns on the proper construction of the term "minimum labor standard." In its decision below, the Seventh Circuit acknowledged the "sparse" "guidance" available to lower courts in interpreting this critical phrase, App. 22a—a lynchpin of federal labor preemption law. Without greater "guidance," two views have emerged over the term's proper meaning. Most courts adhere to this Court's pronouncement that a "minimum labor standard" is any state workplace regulation that applies to union and nonunion workers alike, and thus neither encourages nor discourages union membership and collective bargaining. But there is a competing view, as the Seventh Circuit recognized, and the decision below sided with that view as the "better reasoned" of the two. App. 26a. Under this construction, a state law is not a "minimum labor standard," even though it applies equally to union and non-union employees, if it targets particular classifications of workers in the labor market, or if it is too "stringent" in its substantive terms. The difference between these competing takes on the meaning of "minimum labor standard" was dispositive of respondent's claim here. There is no dispute that the challenged Illinois law does not regulate the process of collective bargaining and applies equally to union and nonunion employees. By eschewing the majority definition of a "minimum labor standard" and adopting the opposing view, however, the Seventh Circuit held the Illinois law preempted.

Respondent does not dispute that this case squarely raises the question presented and otherwise offers an ideal vehicle for addressing a critical and far-reaching aspect of federal labor law. Respondent, however,

entirely ignores the conflict over the minimum labor standard doctrine, while simultaneously espousing the Seventh Circuit's interpretation—which other courts have rejected and which cannot be squared with prior decisions of this Court. Respondent uses the question-begging phrases "true minimum labor standards," "permissible 'minimum labor standard,'" and "valid minimum labor standard," Br. in Op. 2, 3, by which respondent (like the Seventh Circuit) means a state law that does not target particular regions, occupations, or other classifications of workers, *id.* at 5, and whose substantive requirements and remedies a court does not view as overly strict, *id.* at 8.

Respondent never acknowledges that it is choosing sides in the dispute that the Seventh Circuit itself recognized, offers no means to reconcile the competing lower court decisions (except to say that "some laws enacted pass constitutional challenge while others do not," *id.* at 7), and makes no effort to square its reading of "minimum labor standards" with decisions by this and other courts. Pet. 13-22, 23-34. The question presented is the subject of renewed confusion on an issue at the core of federal labor law, and this case is an ideal vehicle for providing lower courts with critical guidance.

I. Courts Are Divided Over Whether Targeted Minimum Labor Standards Are Preempted By The NLRA.

1. In its decision below, the Seventh Circuit observed that this Court has provided only "sparse" "guidance" to assist lower courts in determining whether state laws constitute minimum labor standards and thus avoid NLRA preemption. App. 22a. The Seventh Circuit then identified two competing lines of decision from the federal courts of appeal and adopted the approach—articulated in *Chamber of Commerce v. Bragdon*, 64 F.3d 497 (9th Cir. 1995)—that it considered the "better reasoned" of the two. App. 26a. Without even mentioning this express acknowledgment of a circuit split, respondent insists that "a careful examination of the cases relied upon by Petitioners to seek review shows no conflict between the underlying decision and decisions of other circuits." Br. in Op. 8. But respondent does not identify any legal principles or even facts that explain the divergent outcomes between the decision below and the cases cited in the petition. In the end, respondent cannot avoid the circuit split, for the decision below is impossible to reconcile with decisions of the Second, Ninth, and D.C. Circuits. See Pet. 13-18.

First, respondent claims there is no conflict between the *Bragdon* approach (adopted by the court below) and subsequent decisions of the Ninth Circuit. But in a series of cases after *Bragdon*, the Ninth Circuit affirmatively rejected the *Bragdon* analysis. Pet. 14-16 (discussing *Dillingham Constr. N.A. v. County of Sonoma*, 190 F.3d 1034 (9th Cir. 1999); *Viceroy Gold*

Corp. v. Aubry, 75 F.3d 482 (9th Cir. 1996); *Nat'l Broad. Co., Inc. v. Bradshaw*, 70 F.3d 69 (9th Cir. 1995); and *Associated Builders & Contractors of S. Cal., Inc. v. Nunn*, 356 F.3d 979 (9th Cir. 2004)). Although acknowledging these decisions, Br. in Op. 6-7, respondent makes no meaningful effort to reconcile them with *Bragdon*. About the targeted workplace laws that survived preemption challenge in *Dillingham*, *Viceroy*, and *Bradshaw*, respondent proffers merely that they "demonstrate that some laws enacted pass constitutional challenge while others do not." *Id.* at 7. But as to why the circumstances underlying *Bragdon* supported a finding of preemption and the others did not, respondent has no explanation.

Respondent also finds solace in the fact that the Ninth Circuit in *Nunn* did not overrule *Bragdon* in its entirety and that this Court did not grant certiorari. Br. in Op. 6. But *Nunn* took pains to reject *Bragdon*'s reasoning on the precise issue for which the Seventh Circuit found *Bragdon* "better reasoned"—the notion that state laws cease to be "minimum labor standards" if they target particular classifications of workers. Pet. 15-16 & n.3. As for the denial of certiorari in *Nunn*, that "[o]f course * * * imports no expression of opinion upon the merits of the case, as the bar has been told many times." *Mo. v. Jenkins*, 515 U.S. 70, 85 (1995) (internal quotations omitted). The denial in *Nunn* is particularly inconsequential, for petitioner in that case sought review solely on a question of ERISA, and not NLRA, preemption. Pet. for Writ of Cert., *Associated Builders & Contractors of S. Cal., Inc. v. Acosta*, No. 03-1582, 2004 WL 1175135 (U.S. May 13, 2004).

Next, respondent suggests there is no conflict between the Seventh and the Second Circuits but does not mention, much less attempt to distinguish, the latter's decision in *General Electric Co. v. New York State Department of Labor*, 891 F.2d 25 (2d Cir. 1989), which the petition discussed at length. Pet. 16-17. In an effort to put the Second Circuit to the side, respondent posits merely that that court "did not reject the analysis relied upon by *Bragdon*" in *Rondout Electric, Inc. v. New York State Department of Labor*, 335 F.3d 162 (2d Cir. 2003). Br. in Op. 7. But *Rondout* was far from agnostic toward *Bragdon*; the Second Circuit made its skepticism clear by openly questioning "whether *Bragdon* was correctly decided." *Rondout*, 335 F.3d at 169. The Third Circuit expressed similar skepticism, while also distinguishing *Bragdon* on its facts. *The St. Thomas–St. John Hotel & Tourism Ass'n v. Gov't of U.S. Virgin Islands*, 218 F.3d 232, 244 (3d Cir. 2000).

Finally, respondent merely parrots the Seventh Circuit's effort to distinguish the Amendment challenged here from the law upheld in *Washington Service Contractors Coalition v. District of Columbia*, 54 F.3d 811 (D.C. Cir. 1995), stating that the latter statute targets "multiple occupations" rather than one. Br. in Op. 7. But respondent does not begin to explain (and neither did the Seventh Circuit, App. 26a n.8) how this is a meaningful distinction. There is no reason why a law targeting the employees of District of Columbia "contractors" "who employ 25 or more persons and perform food, janitorial, maintenance, or nonprofessional health care services," *Washington*

Serv., 54 F.3d at 813-814, is any broader in scope than a law targeting all hotel room attendants in one of the nation's largest counties, much less why the relative breadth of these laws would be legally material.

2. Unable to explain away the circuit split, respondent notes that the Seventh Circuit also pointed to the Amendment's anti-retaliation and enforcement provision as support for its finding of preemption. Br. in Op. 8. But the court below also endorsed *Bragdon*, which did not review any enforcement mechanism, as the "better reasoned" among competing views, indicating that the Amendment's enforcement mechanism was not determinative of the outcome below. In any event, separate from its analysis of the Amendment's targeted scope, what the Seventh Circuit concluded was that the Amendment's enforcement mechanism violated a supposed rule that only "low-threshold" laws that would not be "difficult for [a] union to bargain for" qualify as minimum labor standards. App. 35a. Respondent does not even attempt to defend that aspect of the Seventh Circuit's decision, which cannot be reconciled with this Court's cases. Pet. 30.

3. Respondent does not deny that the decision below squarely conflicts with *Illinois Hotel & Lodging Association v. Ludwig*, 869 N.E.2d 846 (Ill. App. Ct. 2007), which sustained the Amendment against an identical preemption challenge. See also *S. Cal. Edison Co. v. Pub. Utils. Comm'n*, 45 Cal. Rptr. 3d 485, 497-498 (Ct. App. 2006) (upholding prevailing wage law over preemption challenge and rejecting *Bragdon* analysis). Rather, respondent observes that the Illinois Appellate

Court is not "a state court of last res[ort]" and claims that *Ludwig* is therefore immaterial to this Court's certiorari determination. Br. in Op. 9. But this Court has often considered the decisions of intermediate state courts in granting certiorari review. See, *e.g.*, *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 414-415 & n.5 (1998). In addition to the circuit split, this Court should grant certiorari because the conflict between the decision below and *Ludwig* leaves petitioner Shannon in an untenable position in trying to enforce State law fairly, Pet. 20. Cf. *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 372 (1969) (certiorari granted to address preemption under Railway Labor Act after state appeals court found federal preemption, in conflict with federal circuit court decision on same issue).

II. The Opinion Below Is Incompatible With Decisions Of This Court.

Respondent's attempt to reconcile the decision below with this Court's decisions in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), and *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), is unsuccessful. The characteristics of the Amendment that respondent highlights have no relevance to the preemption analysis applied in this Court's decisions.

First, respondent stresses that, before the Amendment, Illinois law "already established the appropriate break minimum to be twenty minutes." Br. in Op. 9. But this Court has never suggested that state workplace laws must be static. Pet. 31. To the contrary, problems of legislative classification are

"perennial," and the legislature may determine the need for different remedies based upon different circumstances as it perceives them. *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 489 (1955). Accordingly, reform may proceed one step at a time, as lawmakers address problems incrementally, see *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (upholding state minimum wage for hotel "chambermaids" over substantive due process challenge). That is what occurred here, as the Illinois General Assembly acted to address the conflicting concerns of hotel employers and employees in different parts of the State. Pet. 5-7.

Second, respondent challenges the Amendment as an effort to "target and benefit a small labor pool with a strong union presence." Br. in Op. 10. But *Metropolitan Life* and *Fort Halifax* rejected arguments that purported evidence of legislative attempts to target union-heavy classifications or supplant the substantive results of collective bargaining triggers federal preemption. Pet. 8-29. These decisions establish that the targeted workforce's level of unionization is irrelevant to preemption analysis. In any event, there was no evidence here suggesting that the Amendment provides a special benefit for unionized workers, let alone a "small" group of them. The law applies broadly to union and nonunion hotels throughout one of the most populated counties in the nation.

Third, respondent argues that the Amendment was properly struck down because it has an "exceedingly harsh and drastic enforcement mechanism, unlike any other law Illinois had on the books." Br. in Op. 10. In fact, this Court has never suggested that a reviewing

court's view of a regulation's "harshness" is relevant to federal labor preemption. In *Metropolitan Life* and *Fort Halifax*, the Court upheld state laws imposing obligations on employers at least as "stringent" as the Amendment's. Pet. 30. There is nothing uniquely "drastic" about the Amendment's anti-retaliation provision in any event: States, including Illinois, often authorize multiple-damage awards and attorneys' fees for plaintiffs who vindicate socially beneficial statutory rights. See, *e.g.*, 740 ILCS 175/4(g) (2008) (Illinois Whistleblower Reward and Protection Act); 740 ILCS 10/7(2) (2008) (Illinois Antitrust Act). Nor is the Amendment's rebuttable presumption of retaliation out of the ordinary. Pet. 39-40.

Finally, respondent accuses the petition of mischaracterizing the Seventh Circuit's holding that the Amendment is in part preempted because it lacks an "opt-out" provision exempting employees subject to a collective bargaining agreement from its coverage. Br. in Op. 10. Respondent recognizes that state workplace laws "can be applied to change the terms of the bargaining agreement and do not need 'opt out' language to pass constitutional standards." *Id.*; see also Pet. 32. But that is precisely the point. To support its preemption finding, the Seventh Circuit incorrectly relied on the facts that the One Day Rest in Seven Act had an opt-out for collective bargaining arrangements but the Amendment does not. App. 34a.

III. The Issue Presented Is One Of Critical Importance, And The Decision Below Casts Doubt On Many Workplace Laws.

The petition describes numerous state and local workplace laws that, for purposes of federal preemption, are materially indistinguishable from the Amendment and thus threatened by the decision below. Respondent answers that no court has yet relied on the Seventh Circuit's decision to invalidate a substantive workplace law. Br. in Op. 10-11. Given that the decision was issued less than nine months ago, however, that is hardly telling. Far more probative is the fact that litigants are citing the decision already as authority for a radical expansion of federal preemption principles in both federal and state courts.

For example, although a law's "stringency" and the fact that it targets particular classifications of workers are inappropriate considerations for preemption purposes, *supra* pp. 1, 8-9; see also Pet. 23-34, litigants now routinely cite the Seventh Circuit's decision for the contrary position.

In *California Grocers Association v. City of Los Angeles*, 98 Cal. Rptr. 3d 34 (Ct. App. 2009), a challenge to Los Angeles's law requiring grocery employers to retain their predecessor's workforce for 90 days after the sale of a store, the challengers argued that, under *Bragdon* and the decision below, the NLRA preempts any law that "'targets particular workers in a particular industry' for special protection as to rights that would normally be the subject of collective bargaining." Br. of Pl., 2008 WL 5632131, at *48 n.16. And their amici

cited the decision below for the principle that "[w]here a state or local law seeks to impose greater damages than warranted under the circumstances * * * the law is not a legitimate 'minimum labor standard.'" Br. of Amici Curiae Employers Group & Chamber of Commerce of the U.S., 2009 WL 741996, at *11. The appellate court ultimately held the law preempted, in recognized conflict with the rule adopted by the D.C. Circuit in *Washington Service Contractors Coalition, supra*. *Cal. Grocers*, 98 Cal. Rptr. 3d at 54.

Filings in other cases are to the same effect. See, *e.g.*, Reply Mem. of Def. in Supp. of Mot. to Dismiss, *Rodriguez v. Starwood Hotels & Resorts Worldwide, Inc.*, No. 09-cv-00016, 2009 WL 2590999 (D. Haw. May 11, 2009) (urging preemption under decision below because state law "imposes treble damages, attorneys' fees, and costs—remedies far more severe than those allowed under the NLRA or the [defendant's collective bargaining agreement]"); Pl.'s Br. in Supp. of Mot. for Summ. J., *Metro. Milwaukee Chamber of Commerce v. City of Milwaukee*, No. 08-cv-18220, at 10-11 (Wis. Cir. Ct. March 5, 2009) (urging preemption under decision below because municipal ordinance "sets terms that are beyond what * * * unions have been able to achieve at the bargaining table"). Clearly, the decision below has profoundly unsettled an important area of labor law.

In its final argument, respondent returns to immaterial distinctions, this time between the Amendment and the analogous workplace protection laws cited in the petition. But again, respondent's focus on the level of union membership in Cook County and the Amendment's anti-retaliation provision cannot bear

the weight respondent places on them. *Supra* pp. 8-9. And as for the fact that the Amendment does not apply statewide, Br. in Op. 11, respondent ignores the state prevailing wage laws cited in the petition that apply differently to different geographic areas, as well as the municipal ordinances, which by their nature do not apply statewide, Pet. 38-40. The decision below casts these and other laws into doubt.

* * *

In sum, the Seventh Circuit's approach to NLRA preemption encourages courts to engage in a level of scrutiny of state employee protection laws at odds with the States' traditional authority to regulate the workplace—authority that Congress did not purport to displace. While "[t]here was a time when" federal courts "presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause," *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 347 (2007) (citing *Lochner v. N.Y.*, 198 U.S. 45 (1905)), the Court has long since rejected such "invitations to rigorously scrutinize economic legislation passed under the auspices of the police power," *ibid.* In the decision below, however, the Seventh Circuit "seek[s] to reclaim that ground for judicial supremacy" through an expansive approach to preemption. *Ibid.* This Court's intervention is necessary to avoid a substantial increase in litigation over state and local workplace laws, as well as a revival of judicial interference in the substance of state economic regulation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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